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Office of Administrative Law Judges
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Issue Date: 30 April 2003

CASE NO.: 2002-LHC-328

OWCP NO.: 07-154856

IN THE MATTER OF:

MICHAEL V. DYE

Claimant

v.

TIMCO, INC.

Employer

and

EAGLE PACIFIC INSURANCE COMPANY

Carrier

APPEARANCES:

MICHAEL DYE, PRO SE

MICHAEL MCELHANEY, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Michael V. Dye (Claimant) against Timco, Inc. (Employer) and Eagle Pacific Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on December 13, 2002, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Employer/Carrier proffered 24 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

The record was left open for 30 days for post-hearing development consisting of copies of Claimant's records related to his post-injury job search and post-injury employment. On March 14, 2003, Employer/Carrier submitted a "Follow Up Report," dated March 12, 2003, from vocational expert Ty Pennington which is hereby received into the record as EX-25.

On March 20, 2003, Employer/Carrier also submitted Claimant's Social Security Earnings Record Information, which is hereby received as EX-26. Accordingly, the formal record in this matter is hereby closed.

Post-hearing briefs were received from Claimant and Employer/Carrier on January 13, 2003 and March 14, 2003, respectively. Based upon the stipulations of the parties, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant was injured on August 27, 1999.

2. That there existed an employee-employer relationship at the time of the accident/injury.

3. That Claimant's injury occurred during the course and scope of his employment with Employer.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-__; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

4. That Employer was notified of the accident/injury on August 27, 1999.

5. That Employer/Carrier filed a Notice of Controversion on December 17, 1999.

6. That Claimant reached maximum medical improvement on December 4, 2000.[2]

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Loss of wage-earning capacity.

3. Claimant's average weekly wage.

4. Entitlement to and authorization for medical care and services.

5. Whether Claimant was terminated in violation of Section 48(a).[3]

6. Whether Claimant's termination allows Employer/Carrier to terminate indemnity payments.

7. Attorney's fees, penalties and interest.

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[2] Although two dates are identified on JX-1 as the date Claimant reached maximum medical improvement, the parties stipulated Claimant reached maximum medical improvement on December 4, 2000, when Dr. Terry Smith released Claimant for light duty. (TR. 12-14; EX-13, p. 39).

[3] There is no evidence of record that the issue of discrimination under Section 48(a) of the Act was raised in an informal conference before the District Director; however, Claimant, who is pro se in this matter, unquestionably raised the issue at the hearing and in his post-hearing brief. Further, timeliness of Claimant's Section 48(a) discrimination claim is not an issue because Employer/Carrier have not raised the defense. Accordingly, I find the issue of Section 48(a) discrimination is properly before the undersigned for consideration in this Decision and Order.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was born on November 20, 1963. He graduated from high-school in 1982 and completed a seven-month course in Industrial Electricity, for which he received a certificate in 1987 which allows him to work as an electrician. He also obtained a journeyman's license. (Tr. 22-24).

In August 1999, Claimant began working for Employer as an electrician. He was paid $16.50 per hour and worked 60 hours per week. On August 27, 1999, he was injured when he and a co-worker, "Robert Brewer," were lifting a 350-pound hatch. The latch fell and "it just sort of snatched my [left] arm out of the [shoulder] socket." He informed his foreman, who directed him to Employer's medical facility. He was provided no medications. (Tr. 25-29).

On the following day, Employer drove Claimant to Singing River Hospital to seek treatment for disabling pain in his neck and shoulders. After Claimant was evaluated and underwent X-ray examination, he was told "It's tore up, you're not going to be able to go out there and do any real work." He was prescribed pain medication and received a disability slip for three days off from work. An orthopedic surgeon was also recommended; however, Employer would not authorize the orthopedic surgeon. (Tr. 29-31).

Employer directed Claimant to return to work in the tool room to hand out tools. Claimant made an application to see Dr. Longnecker, but Employer would not allow him time off. Claimant left work without approval to visit Dr. Longnecker, who determined Claimant would probably need surgery. Dr. Longnecker prescribed physical therapy and a Cortisone injection, which did not improve his condition in his shoulder or neck. Dr. Longnecker was unable to prescribe pain medication because of a license revocation, but provided a disability slip for Claimant "for a few days" and restricted Claimant to light-duty work. (Tr. 30-34).

After Claimant returned to light-duty work in Employer's tool room, he worked for two months until his termination. During that time, he suffered pain which caused him to miss work "maybe 10 or 12 days." Claimant would inform Employer when he would be unable to work. He estimated he would work three days and then "take off"

to visit Dr. Longnecker, who would provide a disability slip for the period Claimant missed work.[4] (Tr. 34-35).

On October 19, 1999, Claimant was terminated by Employer. Employer told Claimant he was being terminated because of excessive "late-ins" and "no-shows" on days he failed to call-in according to Employer's procedure. He signed Employer's Disciplinary Action form which indicated he failed to show up or was late without calling-in on October 19, 1999. The form described the reasons he was being terminated and noted he was previously suspended for two days for the same reasons. Claimant admitted, "They suspended me once for missing work, but I was happy to stay at home. I was in pain." Claimant was still on light-duty at the time of his termination. Claimant testified whenever he missed work, Dr. Longnecker would be contacted and provided a written note that Claimant was "out of work for such and such dates." (Tr. 36-38; EX-8, p. 2).

On November 11, 1999, after Claimant was terminated by Employer, Dr. Longnecker performed surgery on Claimant's acromioclavicular (AC) joint. Prior to this surgery, Dr. Longnecker provided conservative treatment consisting of physical therapy, Cortisone injections, and prescribing anti-inflammatory medication. Carrier paid for the surgery and provided $211.00 weekly compensation benefits for one month following surgery. (Tr. 35-36, 38-39).

In January or February 2000, Dr. Longnecker referred Claimant to Dr. Terry Smith, a neurologist or neurosurgeon, for his neck condition. Dr. Smith identified disc problems that warranted surgery. He installed plates and screws into Claimant's neck in February 2000. Carrier paid for the February 2000 surgery. (Tr. 40-41).

From November 11, 1999, when Claimant's shoulder surgery occurred, until February 2000, when his neck surgery was performed, Claimant was not placed on any kind of modified work duty, but was restricted from work the whole time. In October 2000, Dr. Smith returned Claimant to light duty with restrictions against lifting

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[4] Dr. Longnecker's records contain three disability slips which were provided after Claimant's August 1999 job injury. On September 1, 1999, Claimant was "in our office this date. He should continue with light duty x 2 weeks." On September 29, 1999, Claimant was "unable to work Tuesday and Wednesday of this week. On November 19, 1999, Claimant could perform no work for three weeks. (EX-10, pp. 63-65).

more than 20 pounds, climbing, repetitive motions, and crawling. Claimant could not recall if any permanent impairment ratings were assigned by Dr. Smith. When Dr. Smith opined Claimant could return to light duty, Carrier discontinued compensation benefits payments, which were increased to $435.00 per week around August 2000. (Tr. 41-44).

Claimant would like to treat with "Dr. Fleet," but Employer/Carrier have refused authorization. He quit treating with Dr. Smith because "he wouldn't listen to me. I tried to tell the man I'm hurting. The least he could do is check and see if he can find anything wrong." He returned to Dr. Longnecker, who referred Claimant to Dr. Fleet based on X-ray results which indicated something between Claimant's shoulder blades was wrong. An MRI of the same area of Claimant's body revealed no significant findings. Claimant last treated with Dr. Longnecker in June 2001. (Tr. 44-47).

After his surgeries, Claimant began looking for work in January 2001. He attempted to obtain various jobs in the electrical field for former employers, some of whom needed no application because his information was already on file. He applied with a contractor at Chevron and with Bender Shipyard. At the time, he could no longer perform electrical work, but could perform a job as a tool-pusher. Although he could not recall the specific employers, Claimant sought a number of jobs "doing basically anything" in Texas. (Tr. 48-53; 59-60).

Claimant received a copy of a vocational report which he understood was obtained by his former counsel for another client.[5] It identified available positions with potential employers in the region. He called a few of the employers whose positions he believed were within his restrictions; however, he was not offered

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[5] Claimant's Counsel filed a Motion to Withdraw as counsel in this case on April 18, 2002, and that Motion was approved on May 7, 2002.

Employer/Carrier obtained a copy of a vocational report prepared by vocational specialists hired to evaluate Claimant. They did not provide a copy of the report to Claimant, who allegedly failed to meet with Employer/Carrier to receive it. However, a copy of the Summary of Contacts without Claimant's name on it was provided to Claimant by his former counsel. Claimant recalled being told the report was prepared for another client with "the same problem." (Tr. 60-64; EX-24).

any positions after he informed the employers he could no longer perform electrical jobs due to his injury.[6] (Tr. 55-58).

In December 2001, Claimant worked three weeks for "M&K" in Monticello, Arkansas earning $1,600.00 per week. His brother-in-law provided the job "so I'd have some Christmas money." He "didn't really have to do anything" at the job, and was terminated because the company experienced "constant rollover." Other than the three-week position with M&K, Claimant has not worked since his job injury. (Tr. 58-60).

On a daily basis, Claimant watches television, reads magazines, and "calls about a job here and there." He is capable of some yard work and housework, including cooking, cleaning, mopping, washing laundry, and washing dishes. (Tr. 64-65).

On cross-examination, Claimant admitted he was advised by Employer/Carrier to seek legal counsel. (Tr. 66). He admitted he requested Dr. Longnecker to provide a referral for treatment with Dr. Fleet, who was recommended by a satisfied patient, when Claimant reported symptoms of convulsions and passing out. Dr. Longnecker approved Claimant's request and prepared a written request to Carrier seeking approval for Claimant to treat with Dr. Fleet.[7] (Tr. 70). Claimant reported the same symptoms of convulsions and passing out to Dr. Smith, whose records should reflect his complaints. He admitted he never contacted Employer/Carrier to request treatment with Dr. Fleet. (Tr. 66-70; EX-10, p. 22).

Claimant has not returned to Drs. Longnecker and Smith for any medication. For his symptoms of convulsions and passing out, neither physician prescribed any medications. Dr. Longnecker was "not that kind of doctor," but provided muscle relaxants. Dr. Smith simply ignored his complaints. (Tr. 71-72).

Dr. Longnecker was Claimant's physician prior to the instant job injury. He performed surgery on Claimant's elbow in 1993 or

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[6] Claimant alleged he was "blackballed" by employers who discovered he received compensation benefits related to his injuries; however, he could not recall nor provide any record of a specific employer engaging in such alleged discrimination. (Tr. 56-58).

[7] Claimant did not provide a copy of Dr. Longnecker's request to Carrier at the hearing, but recalled seeing the request. (Tr. 70).

1994, and Claimant chose Dr. Longnecker as his physician for the August 27, 1999 shoulder injury. Dr. Longnecker referred Claimant to Dr. Smith, but Carrier "sent me to see a Dr. Hudson to confirm that my neck was injured." (Tr. 75-76).

Claimant admitted telling Employer/Carrier's counsel he quit receiving compensation benefits checks when he refused a drug screen in October 2000. He did not know his checks would be discontinued upon refusal to submit to the drug test. He admitted he was never restricted from driving by any doctor and that he occasionally attempted to dance after his job injury and before he underwent the related surgeries. He also admitted he was not a very good dancer, but tried to dance at a "country bar" at some point after his job injury. (Tr. 76-82).

The Medical Evidence

Dr. Marshall B. Plotka, M.D.

On August 28, 1999, Dr. Plotka, whose credentials are not of record, treated Claimant who reported complaints with his neck and shoulder after he sustained an injury while lifting hatches with co-workers for Employer. He heard "two pops" in his shoulder and neck when a co-worker let go of the heavy equipment he was lifting. Tenderness was reported in Claimant's AC joint and his "left trapezius all the way up to his neck and shoulder." (EX-8, pp. 53-54).

Examinations revealed decreased range of motion and decreased use of Claimant's left arm and shoulder secondary to pain. Dr. Plotka diagnosed "[AC] sprain, left. First or second degree." Claimant was "given 60 mgs of IM Toradol and had relief of the pain. He was also given a sling for his left arm. He had only Tylenol before that." Claimant received a prescription for Naprelan, a "sling to be worn at bed time and three times a day during the day for range of motion," and "rest, ice and sleep propped up." (EX-8, p. 54).

Dr. Plotka prescribed an arm sling and restricted Claimant from lifting more than 25 pounds, climbing or scaffolding and over-the-shoulder work. Dr. Plotka restricted Claimant to "minimum work" using his right arm. (EX-8, p. 55).

Dr. Morton F. Longnecker

On June 20, 2002, Dr. Longnecker, a Board-certified orthopaedic surgeon who has practiced since 1971, was deposed by

Employer/Carrier.[8] (EX-10). In 1994, Dr. Longnecker assigned a 15-percent loss of function of the right arm with restrictions against overhead work and repetitive motion of the right arm. Occasional lifting of up to 20 pounds was approved. Claimant reached maximum medical improvement from that injury on November 7, 1994, when Dr. Longnecker released him to return to work. (EX-10, p. 6).

On September 1, 1999, Dr. Longnecker treated Claimant for the instant injury. Claimant reported severe pain which precluded him from raising his left shoulder following his August 1999 job injury. Claimant was currently working light-duty, which was assigned by Employer's medical supervisors. (EX-10, p. 7).

Examination revealed tenderness over the AC joint, in his upper back "about the shoulder blade, and at the base of the neck." Claimant could not raise his shoulder secondary to discomfort. He was neurologically intact, and his radiology reports were normal. Dr. Longnecker prescribed Cortisone preparation, anti-inflammatory medicines and a muscle relaxant. Dr. Longnecker prescribed hot packs and continued Dr. Plotka's restrictions. (EX-10, pp. 7-8).

On September 13, 1999, Claimant returned for follow-up treatment, complaining of neck and shoulder problems which abated but persisted. Claimant requested an MRI, which Dr. Longnecker agreed to request, because Claimant "felt there was something wrong as he described it." Tenderness continued at the AC joint and at the base of his neck. Cortisone injections were provided, and Claimant was continued on light-duty work. (EX-10, pp. 8-9).

On September 27, 1999, Claimant returned with shoulder and cervical X-rays and an MRI that revealed a bulging disc at C6-7 which Dr. Longnecker opined did not appear to be a "surgical problem." The radiological and MRI results indicated spurring of the AC joint with impingement of the rotator cuff as the most significant problem. If pain persisted, Dr. Longnecker recommended a "clean-out" procedure and removal of the spur. He opined the spur pre-existed Claimant's job injury, but was permanently aggravated by it. The surgery was performed without any problem on November 11, 1999 after the symptoms persisted. (EX-10, pp. 9-11, 46, 49-50, 52-53).

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[8] Claimant was not present at the deposition. Counsel for Employer/Carrier certified he mailed via United States Mail, postage prepaid a copy of the Notice of Deposition to Claimant at his home address on June 19, 2002. (EX-2; EX-10, pp. 18-19).

On December 3, 1999, Claimant exhibited full range of motion with some localized soreness, which was normal. A pre-operative X-ray revealed "something" for which more X-rays and a CT scan were ordered. On December 17, 1999, Claimant's chest X-ray was normal, indicating the pre-operative X-ray merely revealed "an overlying bony shadow." (EX-10, pp. 10-11, 46, 51).

On January 21, 2000, Claimant's shoulder was fine, but his neck problems persisted. Dr. Longnecker concluded Claimant reached maximum medical improvement regarding his shoulder problems and assigned a "ten percent [permanent] loss of function to his [left] shoulder as a scheduled member with limitations, no repetitive use, no overhead work, no lifting over 15 to 20 pounds." The impairment and restrictions were the result of the combination of pre-existing spurring along with the aggravation of the spurring by the job injury. Dr. Longnecker recommended a neurological consultation with Dr. Smith, to whom Dr. Longnecker would defer regarding cervical symptoms, for Claimant's continued neck complaints. (EX-10, pp. 12-14).

Dr. Terry C. Smith, M.D.

On May 24, 2002, Dr. Smith, a Board-eligible neurosurgeon, was deposed by Employer/Carrier.[9] (EX-13). Dr. Smith treated Claimant upon the referral of Dr. Longnecker. (EX-13, p. 6).

On March 21, 2000, Dr. Smith examined Claimant, who reported neck pain "starting on the left side . . . to the interscapular area and occasionally into his left arm as far as the elbow. An MRI indicated Claimant suffered a herniated disc at C6-C7 on the left. There was a "hint of a disc protrusion at that same level" on a 1995 cervical MRI, "but it was not as prominent as it was on his new scan." A C6-C7 herniated disc may impinge the C7 nerve root, which may cause numbness in the index finger and middle finger, triceps weakness and reflex, which Claimant exhibited. Dr. Smith, who noted Claimant reported the last day he was able to work occurred in October 1999, restricted Claimant from work and prescribed physical therapy. (EX-13, pp. 6-8, 10, 85).

On May 11, 2000, after Claimant's symptoms persisted, an anterior corpectomy and fusion surgery was performed on Claimant's neck at the C6-C7 level. On June 21, 2000, Claimant's only arm

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[9] Counsel for Employer/Carrier certified he mailed via United States Mail, postage prepaid a copy of the Notice of Deposition to Claimant's home address on May 22, 2002. (EX-2; EX-13, pp. 20-21).

symptom was "a little numbness in the left hand. The physical therapy was helping, although he does still have some pain in his neck and upper back." Physical therapy was extended for three more weeks, at which time Dr. Smith planned to release Claimant to return to work. (EX-13, pp. 8-9, 57-58).

By August 16, 2000, Claimant still complained of numbness and tingling in his left hand, but also complained of pain on the right side of his neck. He had a "subjective" complaint of numbness in his thumb, which was unrelated to his problems at the C6-C7 distribution. Claimant voluntarily discontinued physical therapy in the "middle" of the process, and therapy notes indicated therapists unsuccessfully tried to contact Claimant. Although Dr. Smith opined Claimant could return to work, Claimant concluded he could not return to his job as an electrician, unless it was modified. Consequently, Dr. Smith ordered a functional capacity evaluation (FCE). (EX-13, pp. 10-12).

On October 4, 2000, Claimant returned with complaints of pain to his right shoulder, which was unrelated to the instant injury. Dr. Smith placed Claimant at maximum medical improvement for his neck and shoulder injuries upon a review of Claimant's FCE. (EX-13, pp. 13-14).

The FCE indicated Claimant could not return to his prior occupation according to its requirements; however, Claimant could return to work lifting and carrying a maximum of 25 pounds, limited flexion and extension of the neck, avoidance of crawling and pushing with the left arm, and avoidance of prolonged overhead work. When he was asked by Carrier if Claimant could perform any jobs described in a labor market survey Carrier provided, Dr. Smith opined Claimant could perform all of the jobs on its list within his restrictions. Dr. Smith would defer to the FCE "that says he could do the work that's set forth in the FCE," and noted the FCE "is much more reliable than what I said." Dr. Smith specifically approved the jobs identified at Grand Casino, Coastal Energy, Pinkerton Security, Imperial Palace, Swetman Security, President Casino, Boomtown Casino, Treasure Bay, and Lowe's listed in EX-24, the September 27, 2000 labor market survey. (EX-13, pp. 13-14, 17-18, 26-30; See also EX-13, pp. 28-30).

Dr. Smith did not have an opinion whether Claimant could return to his prior occupation according to Employer's description of the job. The job apparently required lifting 25 to 35 pounds overhead, which exceeds his restriction against lifting a maximum of 25 pounds; however, Claimant could return to his job "for the most part" except for lifting in excess of 25 pounds. If Claimant's prior job could be modified to preclude lifting more

than 25 pounds, Dr. Smith opined Claimant could "do every bit of the work." He agreed that Dr. Longnecker's 1994 restrictions associated with an unrelated injury were more restrictive than Claimant's restrictions after the instant injury. (EX-13, pp. 14-18).

Dr. Jim K. Hudson, M.D.

On October 20, 1999, the day after Claimant's termination, Dr. Hudson, whose credentials are not of record, evaluated Claimant at Bienville Orthopaedic Specialists at Employer/Carrier's request. Claimant reported complaints of pain in his neck and shoulder after a job injury while lifting a 300-pound hatch. His pain was worse with cough and "while driving a car or similar forward flexion or abduction type of maneuvers of the shoulder." Dr. Hudson noted Claimant received conservative treatment after the injury and was placed on light duty status. (EX-9, p. 2).

Dr. Hudson examined Claimant and reviewed his cervical MRI. His assessment included: (1) cervical degenerative disc disease, C6-7, questionably symptomatic, (2) AC joint degenerative disc disease, left shoulder, and (3) rotator cuff injury, left shoulder, possible tear. Dr. Hudson opined surgical treatment by Dr. Longnecker was reasonable if all conservative measures were exhausted. His diagnosis and surgical recommendation were "consistent with an industrial injury." (EX-9, p. 3).

Prognosis for Claimant's recovery was good, and Dr. Hudson expected Claimant to continue working light duty with the restrictions provided by Dr. Longnecker. If Claimant sustained a cuff tear, anticipated maximum medical improvement would be reached 12 weeks after surgery, while maximum medical improvement would be reached possibly as early as 6 weeks after surgery if Claimant would undergo acromioplasty and distal clavicle resection. (EX-9, pp. 3, 11).

The Vocational Evidence

Christopher Ty Pennington

On December 10, 2002, Mr. Pennington was deposed by Employer/Carrier.[10] He is a certified rehabilitation counselor who works in Pascagoula, Mississippi with Rehabilitation, Inc., a case management company handling work injury-related cases including those under the Act. He has been accepted as an expert in State Worker's Compensation cases and in Federal cases under the Act. (EX-16, pp. 7-8).

On September 27, 2000 and November 25, 2002, Mr. Tingle and Mr. Pennington, respectively, prepared labor market surveys for Claimant.[11] On December 9, 2002, Mr. Pennington prepared a "composite report," which indicated Claimant could perform a variety of occupations within his physical limitations and restrictions, although some jobs may require Claimant to have some entry-level training. Some of the jobs on Mr. Pennington's list were periodically available since September 2000, while others were available since November 2002. (EX-16, pp. 8-9, 22-28; EX-24).

The jobs which were available since September 2000 included positions as a card-dealer, cashier, and surveillance operator for Grand Casino, Imperial Palace Casino Resort, and Treasure Bay

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[10] Counsel for Employer/Carrier certified he mailed via United States Mail, postage prepaid a copy of the Notice of Deposition to Claimant's home address on December 4, 2002, but Claimant failed to attend the deposition. (EX-2; EX-16, pp. 19-20).

[11] Previously, on August 27, 2000, Mr. Leon Tingle, a principal at Rehabilitation, Inc., met Claimant and prepared a vocational report based on Claimant's medical records. Mr. Tingle noted Claimant has "limited transferable skills" that could be used in other occupations because "skills gained in medium to heavy work do not readily transfer to sedentary light work" to which Claimant was restricted by his physician. Claimant possessed the abilities to follow oral or written directions and to communicate orally. He possessed knowledge of electrical concepts and processes. Jobs such as meter-readers would not be found in significant numbers in Claimant's area. Only generic job titles were provided, e.g., "cashier, security guard, and gate tender" with no description of their physical demands or requirements. A labor market survey was suggested. (EX-16, pp. 8-9, 22-25).

Casino Report. The job descriptions and requirements were previously described in a September 27, 2000 labor market survey and were considered to be within Claimant's physical limitations and restrictions by Dr. Smith, who approved them. Mr. Pennington anticipated no difficulty for Claimant in passing an examination to become a card-dealer because Claimant is intelligent and completed his education and certification as a first-class electrician.[12] Depending on the season, the size of the casino and other factors, card-dealers might earn from $12.00 per hour to $20.00 per hour, which is a combination of a base salary plus a "tote rate," which is a percentage of tips shared between the dealers on a particular shift. (EX-16, pp. 11-15).

Jobs which became available in November 2002 included dispatcher positions, a sales position, an electrician position, a manager position, and a surveillance operator position. No description of their physical demands or requirements was provided. A dispatcher for the City of Biloxi was an available sedentary job which required a high-school diploma or GED. An applicant must have also possessed the ability to pass a minimum typing and number test. The position paid $10.79 per hour. An available job as a public safety dispatcher for Mobile County Personnel in Mobile, Alabama required an applicant to pass a two-part examination including the ability to type up to 30 words per minute. The position required a high-school diploma and a course in word processing. It was sedentary work which paid from $1,615.00 to $2,506.00 per month. An inside sales position for Stuart C. Irby was available for applicants with strong electrical backgrounds, customer service skills, computer skills, and oral and written skills. The job was classified as "light level work that will begin around $25,000.00" per year. (EX-16, pp. 14-17, 27-28).

Available jobs as a first-class electrician performing maintenance on hand-tools and light kits in an electrical shop or performing routine maintenance on oil rigs were available with Friede Goldman. The jobs were "light" in nature, and entry-level pay for the jobs was $15.25 per hour. Mr. Pennington spoke with the employer's representative, who told him the employer maintains a "light duty program" which provides positions for first-class electricians who are restricted to light-duty. He was also told

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[12] According to Mr. Pennington's December 9, 2002 report, Claimant "could have received training for approximately eight to thirteen weeks in order to be employed as a dealer. 'Break in dealers' are hired following completion of the training program without experience as long as they are able to pass an audition for employment." (EX-16, p. 26).

the positions were available in September 2000. A light-level counter retail manager position was available at Clark Personnel, which required the applicant to possess a high-school diploma or GED, good customer skills, and knowledge of equipment. The duties included assisting customers with equipment, filling out paperwork, and handling money. Starting salary was "around $20,000.00 per year." A light-level surveillance operator position was available with President Casino, which required the applicant to have knowledge of table game rules and procedures. Starting salary was "around $10.00 or more an hour." (EX-16, pp. 15-17, 28).

Physical Therapy Center of Ocean Springs
Functional Capacity Evaluation

On August 29, 2000, Douglas G. Roll, PT, OCS, OMPT reported the results of Claimant's functional capacity evaluation (FCE). Claimant's former job as an electrician was described as "medium work which is defined as lift/carry up to 50 [pounds] occasionally. This client states that stand, kneel, squat, crouch, crawl, climb, and work overhead." (EX-13, p. 35).

After two days of testing at maximum effort, Claimant established the ability to perform at light-duty, which was defined as "lifting, carrying, pushing, pulling 20 [pounds] occasionally, frequently up to 10 [pounds], or negligible amount constantly. Can include walking or standing frequently even though weight is negligible. Can include pushing or pulling of arm and or leg controls." Id.

The FCE concluded Claimant could not return to his former occupation as an electrician; however, he could return to the workforce "in some capacity" within the guidelines of the FCE. Vocational intervention could be helpful. He should avoid prolonged overhead work and weight-bearing tasks such as crawling or pushing with left upper extremity. He should avoid prolonged cervical flexion and extension posture. He should lift or carry no more than 20 to 25 pounds with the left upper extremity; however, if he was required to lift more than that amount, he should use both upper extremities or the right upper extremity. Id.

Other Evidence

Mr. Robert Knowles

On December 5, 2002, Mr. Knowles was deposed by Employer/Carrier.[13] (EX-18). Mr. Knowles is employed as a human resources and safety and health director by Prime Electric Services, which purchased Employer. He was a safety and health director for Employer from October 1999 until March 2001. His main office was in Beaumont, Texas, but he frequently visited the Pascagoula location. Mr. Knowles did not know Claimant personally, but reviewed Claimant's personnel records provided by Employer/Carrier. (EX-18, pp. 2-5).

According to Mr. Knowles, Claimant was terminated because of excessive late-ins and no-calls on October 19, 1999. Claimant violated Employer's procedure for employees to follow when sick or ill, which was to "call in, and after that bring a medical excuse." Although Claimant may have stated he was terminated because he refused a drug screen, there is no record of it in Employer's personnel files. Such a refusal would be in violation of Employer's policy and possibly warrant termination. But for Claimant's violation of Employer's policy, there is no reason Claimant would not have remained employed by Employer. (EX-18, pp. 5-7).

According to Mr. Knowles, who could not recall what job Claimant was performing when he was terminated, it was Employer's policy to return injured employees to light-duty within restrictions assigned by a treating physician. There was "no fixed rule" limiting the amount of time injured employees were allowed to work upon their return. Weekly hours varied depending on the job assignment, but "most of the time it was 40 hours." (EX-18, pp. 7-8).

Mr. Knowles noted Claimant was originally hired as a first-class electrician. He estimated similar employees who worked 40 hours per week in Claimant's craft would earn $15.60 per hour, pursuant to the calculation provided by his employer's "payroll person," who "pulled 10 that she could find from that job and did

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[13] Claimant was not present at the deposition. Counsel for Employer/Carrier certified he mailed via United States Mail, postage prepaid a copy of the Notice of Deposition to Claimant at his home address on December 4, 2002. Claimant was also scheduled to be deposed on December 5, 2002, but failed to appear. (EX-2; EX-18, pp. 13-14; EX-23).

an average . . . .” He did not know what formula the payroll person used to arrive at her number, nor was he aware of how many weeks were used in the calculation of the average wage. He estimated Claimant’s job at the time of injury would have lasted “seven months or roughly 28 or 30 weeks,” although he did not know when the job started or ended. Based on the estimates of $15.60 per hour and a 28-week job, Mr. Knowles concluded Claimant’s average weekly wage at the time of injury was $624.00 per week. (EX-18, pp. 8-11).

Ms. Kriste Henderson

On December 10, 2002, Ms. Henderson, an adjustor who handled Claimant’s claim for Carrier, was deposed by Employer/Carrier.[14] According to Ms. Henderson, Claimant requested treatment with Drs. Longnecker, who previously treated him for an unrelated injury, and Smith, who Dr. Longnecker recommended. Claimant has never requested any other physicians, nor has Ms. Henderson ever refused on behalf of Carrier to allow Claimant to treat with any physician he requested. (EX-17, pp. 5-7).

By December 10, 2002, Carrier paid $32,069.00 in medical benefits and $19,772.90 in temporary total disability compensation benefits regarding Claimant’s claim. The compensation benefits were paid from November 11, 1999 until October 4, 2000, based on Claimant’s average weekly wage of $631.05. Compensation benefit payments were terminated on October 4, 2000 after Dr. Smith released Claimant to return to work at light duty with restrictions and approved suitable light duty jobs within Claimant’s physical limitations and restrictions which were identified by Mr. Tingle in a September 27, 2000 labor market survey. (EX-17, pp. 7-10, 14-21).

Report of Keith Knudsen, Doug Taylor, Joe Garrett and Wayne Nelson

An unsigned letter dated September 3, 1999, appears to be written on behalf of Mr. Knudsen, Mr. Taylor, Mr. Garrett, and Mr. Nelson. The letter describes Claimant who was purportedly seen dancing “The Cotton Eye Joe” in “Johnnie Joe’s” on September 2, 1999 at 10:30 p.m. The authors of the letter reported Claimant was in “no physical discomfort or lacking in full mobility” while he was dancing “without the sling he normally wears.” When allegedly confronted by Mr. Taylor about his “remarkable recovery,” Claimant

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[14] According to Employer/Carrier’s counsel, Claimant was notified of the deposition but failed to attend. (EX-17, pp. 4-5, 12-13).

"attributed it to the painkillers he had been prescribed for his injury." (EX-8).

The Contentions of the Parties

Claimant contends his termination was related to his disability and in retaliation for hiring an attorney. He acknowledged he was late for work or missed work, but relates his tardiness and absence to his job injury and its residuals. He alleges he informed Employer of days he would miss or on which he would be late and provided a doctor's excuse for those days. He asserts he continues to suffer ongoing and worsening symptoms after his job injury. He argues his average weekly wage was $1,200.00 or $1,300.00 at the time of his job injury.

Employer/Carrier argue they provided medical benefits and compensation benefits for two surgeries related to Claimant's job injury. They contend they are not required to pay additional indemnity benefits following Claimant's termination because he was terminated for violating company policy, namely for failing to promptly arrive for work and for refusing a drug screen, after he was provided and performed suitable alternate employment within Employer's facility. Employer/Carrier deny liability for indemnity benefits "except for those periods of time when Claimant was removed from work for surgery by Doctors Longnecker and Smith." They assert Claimant's average weekly wage at the time of injury may reasonably be calculated as either $624.00 or $597.19 under Sections 10(b) or 10(c) of the Act, respectively. They also argue Claimant suffered no loss in wage-earning capacity.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any

particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940);

Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The parties stipulated, and I find, that Claimant reached maximum medical improvement on December 4, 2000, pursuant to the well-reasoned medical opinion of Claimant's treating physician, Dr. Smith. Accordingly, all periods of disability prior to December 4, 2000 are considered temporary under the Act.

August 27, 1999 to September 26, 2000

After Claimant's August 27, 1999 job injury, Dr. Plotka prescribed an arm sling and restricted Claimant from lifting more than 25 pounds. He instructed Claimant to avoid climbing or scaffolding and over-the-shoulder work.[15] Dr. Plotka restricted Claimant to "minimum work" using his right arm. (EX-8, p. 55). Dr. Longnecker concurred with and continued Dr. Plotka's restrictions and released Claimant to return to modified work within those restrictions. Dr. Hudson agreed with Dr. Longnecker's restrictions. The August 29, 2000 FCE specifically concluded Claimant could not return to his prior job as an electrician. Dr. Smith, who deferred to the August 29, 2000 FCE, opined Claimant could not return to his prior occupation but could return to work with restrictions including lifting and carrying a maximum of 25 pounds, limiting cervical flexion and extension, avoidance of crawling, pushing with the left arm, and overhead work. Thus, Claimant established a **prima facie** case that he was unable to return to his prior occupation which required physical activity of lifting and carrying 50 pounds or more and reaching overhead regularly.[16]

As discussed below, Employer/Carrier failed to establish Claimant's post-injury job within Employer's facility constituted suitable alternative employment. Consequently, Claimant is

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[15] It should be noted that, despite the hearsay nature of the evidence, the September 3, 1999 letter purportedly written by Mr. Taylor, et al., confirms Claimant normally wore a sling, which is consistent with Dr. Plotka's prescription for use "during the day" and "at bed time." Further, the letter's contention that Claimant attributed his recovery to painkillers is factually and temporally consistent with: (1) Dr. Plotka's August 28, 1999 notation that Claimant's pain, which was previously treated only with Tylenol, was alleviated after a change in medication; (2) Claimant's August 30, 1999 reported absence from work due to "too much painkiller;" and (3) Dr. Longnecker's September 1, 1999 notation that he provided an injection and other medications to Claimant for the relief of his pain and increase of range in his shoulder motion.

[16] Employer/Carrier provided a job description of Claimant's prior occupation at EX-21; however, Claimant's uncontroverted testimony that he injured his arm while he and a co-worker lifted a hatch in excess of 300 pounds belies the accuracy of the reported lifting requirement of 50 pounds in Employer/Carrier's job description.

entitled to temporary total disability benefits after August 27, 1999 until September 26, 2000, based on his pre-injury average weekly wage of $597.22, as determined below.

September 27, 2000 to December 3, 2000

Claimant's disability status changed from temporary total to temporary partial on September 27, 2000, when suitable alternative employment was established, as discussed below. Thus, he is entitled to $201.05 per week, based on the difference between his pre-injury average weekly wage ($597.22) and his post-injury earning capacity ($295.62) from September 27, 2000 until December 3, 2000 (66.66% x [$597.22 - $295.62] = $201.05).

December 4, 2000 to December 8, 2002

On December 4, 2000, Claimant reached maximum medical improvement and his condition became permanent. Thus, Claimant is entitled to permanent partial disability compensation benefits of $201.05 per week, based on the difference between his pre-injury average weekly wage ($597.22) and his post-injury earning capacity ($295.62) from December 4, 2000 until December 8, 2002. (66.66% x [$597.22 - $295.62] = $201.05).

December 9, 2002 to Present and Continuing

On December 9, 2002, Employer/Carrier again established suitable alternative employment, which indicated Claimant's post-injury wage-earning capacity was $355.52, as explicated below. Thus, Claimant is entitled to permanent partial disability compensation benefits of $161.12 per week, based on the difference between his pre-injury average weekly wage ($597.22) and his post-injury earning capacity ($355.52) from December 9, 2002 to present and continuing. (66.66% x [$597.22 - $355.52] = $161.12).

C. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his

injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Further, an employer may discharge its burden of establishing suitable alternate employment by offering a claimant a job in its facility, including a light-duty job, as long as it does not constitute sheltered employment. Darby v. Ingalls Shipbuilding, Inc. 99 F.2d 685, 688 (5th Cir. 1996); Ezell v. Direct Labor, Inc., 33 BRBS 19 (1999); Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986); Darden v. Newport News Shipbuilding & Dry Dock

Co., 18 BRBS 224 (1986); Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10 (1980). A job tailored to an employee's restrictions is not sheltered as long as it involves necessary work. Darden, supra at 226. Light-duty work is not sheltered employment if the employee is capable of performing it, it is necessary to employer's operations, it is profitable to employer, and several shifts perform the same work. Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987); Walker, supra.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternative employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that ". . . It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." Id.

Employer/Carrier assert they do not have a continuing responsibility to identify suitable alternative employment because Claimant was discharged from his post-injury job, which should be considered suitable alternative employment, for reasons unrelated to his disability. Claimant, who is **pro se**, appears to argue his post-injury employment was not suitable alternative employment for him in his post-injury condition.

If a claimant is discharged for reasons unrelated to his disability, Employer/Carrier do not have a continuing responsibility to identify new suitable alternate employment. Edwards v. Todd Shipyards Corp., 25 BRBS 49, 52 (1991) (an employer

is not a long-term guarantor of employment); Brooks v. Newport News Shipbuilding and Dry Dock Co., 26 BRBS 1 (1992), aff'd sub nom. Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993)(whereas an employer is not a long-term guarantor of employment, it does not have a continuing responsibility to identify new suitable alternate employment when a claimant is discharged for reasons unrelated to his disability); Jones v. Cardinal Services, Inc., (BRB Nos. 98-522 and 98-522A)(September 28, 1999)(unpub.)(one prerequisite for establishing suitable alternate employment is that the claimant is capable of working, and the holding of Brooks, supra, was inapplicable where the claimant was not discharged from a light-duty job which was found to be suitable alternative employment); Ilasczat v. Kalama Services, 36 BRBS 78, 83 (2002)(the holding of Brooks, supra, applies to the situation wherein a claimant is discharged as a result of his own misfeasance after an employer has provided the claimant with suitable alternate employment).

After Claimant's job injury, Employer immediately offered him a light-duty job in its tool room after he was released to return to work with restrictions. The record contains no description of the precise nature and terms of the light-duty job which Employer provided to Claimant, who credibly testified he missed work and was happy to receive a temporary suspension due to his ongoing pain. Further, there is no evidence the work was not sheltered employment or whether it was necessary or profitable for Employer. I find Mr. Knowles's testimony that Employer's policy was to return injured workers to work to light-duty within their restrictions is unpersuasive in establishing Claimant was provided suitable alternative employment when he was provided a job in Employer's tool room in view of a lack of specificity regarding the job's terms and demands.

Mr. Knowles, who did not know Claimant, noted difficulty in obtaining records from the period of time around which Claimant was injured. He did not recall Claimant's pre-injury occupation, nor did he discuss the precise nature and terms of Claimant's work before and after his job injury. Claimant is in a better position to understand his condition and the requirements of his prior occupations, and I find his testimony more persuasive in establishing his post-injury employment did not constitute suitable alternative employment.

Claimant's testimony regarding his post-injury employment is buttressed by the records of Drs. Plotka, Longnecker, and Hudson. After Claimant's job injury, Dr. Plotka restricted Claimant from lifting more than 25 pounds, climbing, scaffolding, and over-the-shoulder work. He prescribed an arm sling and restricted Claimant

to "minimum work" using his right arm, which limited Claimant's capability. On September 27, 1999, Dr. Longnecker, who noted Claimant's continuing shoulder and cervical pain, anticipated surgery upon approval from Carrier. On October 20, 1999, a day after Claimant's termination, Claimant reported to Dr. Hudson that his pain was becoming worse. His neck and shoulder pain bothered him "all the time," and rest provided Claimant with the most relief. Dr. Hudson, who noted he "commonly sees" patients with persistent symptoms after similar injuries, agreed surgery would be necessary if Claimant's pain persisted. (EX-9, pp. 2-3, 5).

In light of the foregoing, I find Employer/Carrier failed to carry their burden of establishing Claimant was provided suitable alternative employment when Employer provided Claimant with a job in its tool room. Thus, pursuant to the holding of Brooks, supra, I conclude Employer/Carrier were not relieved of the obligation of establishing suitable alternative employment.

Moreover, I find Claimant's ongoing shoulder and neck pain was the cause of his failure to arrive at work timely if at all. On August 30, 1999, Claimant reported he was on excessive pain medication which precluded his attendance at work. On the same day, there is a notation in Dr. Longnecker's records which appears to indicate Claimant attempted to treat with him, but the visit was not approved by Carrier. (EX-10, p. 31). On September 8 and 9, 1999, Claimant was reported sick and treating with a physician; however, he nevertheless received a written warning because his failure to call in promptly on those dates caused his absence to be considered a no-call/no-show. Claimant testified he was in pain on September 12, 1999, when he was suspended for two days for his failure to promptly arrive at work on that date. Although "car trouble" was a reported reason for Claimant's late arrival on September 27, 1999, Dr. Longnecker's testimony and records establish Claimant was treating with him on that date. Otherwise, Claimant credibly testified he had difficulty performing modified work because of his pain.

Consequently, I find Claimant's termination was not unrelated to his work-related disability that caused his ongoing complaints of pain in his neck and shoulder. Thus, pursuant to Brooks, supra, Employer/Carrier have a continuing responsibility to identify new suitable alternate employment because Claimant was discharged for reasons related to his disability.

I find Claimant's uncontroverted testimony that his employment with M&K was arranged by his brother-in-law for the purpose of obtaining some "Christmas money" and that he was required to do "nothing" is persuasive in establishing the three-week job was

sheltered employment. Accordingly, I do not find Claimant's employment with M&K establishes his post-injury wage earning capacity, nor does it constitute suitable alternative employment.

On September 27, 2000, Mr. Tingle identified jobs which he opined were available and within Claimant's physical limitations and restrictions. Dr. Smith opined all of the jobs on Mr. Tingle's list were within Claimant's physical limitations and restrictions, and approved all of the jobs.

In light of the foregoing, I find the opinions of Dr. Smith and Mr. Tingle persuasive and cogent in establishing positions were available which constituted suitable alternative employment within Claimant's physical limitations and restrictions. However, insofar as card-dealing jobs which required unpaid training were identified in the vocational report, I find that they do not constitute suitable alternative employment. See Sutton v. Genco, Inc., 15 BRBS 25 (1982)(if a suggested job would require six months of unpaid training, it is arguably unavailable); Hayes v. P & M Crane Co., 23 BRBS 389 (1990), vacated on other grounds, 24 BRBS 116 (CRT) (5th. Cir 1991)(neither the Act nor the regulations require that the claimant to undergo vocational rehabilitation training); Mendez v. Bernuth Marine Shipping, 11 BRBS 21, 29 (1979), aff'd, 638 F.2d 1232 (5th Cir. 1981). Consequently, Claimant must demonstrate he used reasonable diligence to obtain alternative employment without success.

In this case, Claimant has failed to demonstrate a reasonably diligent job search. Claimant stated he did nothing to apply for a job or to find employment until January 2001, despite his receipt of a list of available job opportunities prepared by Mr. Tingle in September 2000. Claimant's records do not reveal any job searches until March 2001, when he appears to have possibly contacted employers for available positions. Other than phone numbers and names of alleged potential employers, there is no information in Claimant's records supporting a conclusion he diligently pursued employment. His testimony that he "calls about a job here and there" while he watches television and reads magazines on a daily basis undermines his assertions that he has diligently pursued employment opportunities.

Consequently, I find Claimant has failed to establish a reasonably diligent job search. Thus, I find that, given Claimant's age, education, industrial history and availability of employment, Claimant's residual wage earning capacity amounts to the average of the hourly wages of jobs reasonably available. See Avondale Industries, Inc. v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998)(averaging is a reasonable method for determining an

employee's post-injury wage earning capacity); Louisiana Insurance Guaranty Association v. Abbot, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994)(averaging salary figures to establish earning capacity is appropriate and reasonable). The suitable jobs identified in Mr. Tingle's September 27, 2000 report include:

Employer:	Description:	Hourly Rate:
Grand Casino	Desk Clerk	$8.00
Grand Casino	Security Guard	$7.50
Grand Casino	Surveillance Operator	$10.65
Coastal Energy	Cashier	$6.60[17]
Pinkerton Security	Security Guard	$5.90
Imperial Palace	Desk Clerk	$8.00
Imperial Palace	Cashier	$7.00
Imperial Palace	Surveillance Operator	$10.00
Swetman Security	Security Guard	$6.25
President Casino	VIP Clerk	$7.27
Boomtown Casino	Security Guard	$7.30
Treasure Bay	Security Officer	$7.00
Treasure Bay	Surveillance Operator	$10.00
Lowe's	Cashier	$5.50

Accordingly, I find Employer/Carrier established suitable alternative employment on September 27, 2000 paying an average of $7.64 per hour ([$8.00 + $7.50 + $10.65 + $6.60 + $5.90 + $8.00 + $7.00 + $10.00 + $6.25 + $7.27 + $7.30 + $7.00 + $10.00 + $5.50] ÷ 14 = $7.64), or $305.63 for a 40-hour work week ($7.64 x 40 = $305.63). Taking into consideration the increases in the national average weekly wage between August 27, 1999, the date of accident, and September 27, 2000, the date Employer/Carrier proved suitable alternative employment, $305.63 per week in 2000 equates to $295.62 in August 1999.[18] Thus, as Claimant's average weekly wage at the

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[17] The Coastal Energy job paid $6.15 per hour during the week and $7.73 per hour on the weekends. An average of the hourly rates yields $6.60 per hour ([(5 x $6.15) + (2 x $7.73)] ÷ 7 = $6.60).

[18] Claimant was injured on August 27, 1999. The national average weekly wage from October 1, 1998 to September 30, 1999 was $435.88. Employer/Carrier demonstrated suitable alternative employment on September 27, 2000. The national average weekly wage from October 1, 1999 to September 30, 2000 was $450.64, reflecting an increase of $14.76, or 3.39% from 2000. ($14.76 ÷ 435.88 = .0339). Employer/Carrier established suitable

time of accident was $597.22, and his post-injury earning capacity is $295.62, Claimant is entitled to permanent partial disability benefits, pursuant to Section 8(e) of the Act, of $201.05.[19] After Claimant's disability status changed from temporary partial to permanent partial on December 4, 2000, he is entitled to permanent partial disability benefits, pursuant to Section 8(c) of the Act, of $201.05.[20]

Employer/Carrier again established suitable alternate employment on December 9, 2002, when Mr. Pennington provided his report indicating several jobs from the September 27, 2000 labor market survey remained available and suitable for Claimant in addition to others that recently became available. The previously

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alternative employment at $305.63 per week on September 27, 2000, and discounting that amount by 3.39% results in 1999 earnings of $295.62 ($305.63 ÷ 1.0339 = $295.62). See Table of Compensation Rates as of October 1, 2001, Longshore Newsletter and Chronicle of Maritime Injury Law, vol. XIX, No. 7, Oct. 2001.

[19] Section 8(e) provides:

> In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment . . . .

33 U.S.C. 8(e)(2002). Thus, Claimant's compensation benefits are computed by subtracting $295.62 from his average weekly wage of $597.22, yielding a difference of $301.60, which, when multiplied by .6666, equals $201.05.

[20] Section 8(c)(21) provides:

> Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. § 908(c)(21)(2002). Thus, Claimant's compensation benefits are computed by subtracting $295.62 from his average weekly wage of $597.22, yielding a difference of $301.60, which, when multiplied by .6666, equals $201.05.

identified jobs for Grand Casino, Imperial Palace and Treasure Bay Casino Resort, which were approved by Dr. Smith and Mr. Tingle, remain suitable alternative employment. The card-dealing jobs remain unsuitable in light of Claimant's physical limitations and restrictions for the reasons noted above. The dispatcher jobs require applicants to do minimum typing standards, and there is no evidence Claimant can type well enough to satisfy those requirements. Thus, the dispatcher jobs do not constitute suitable alternative employment.

In his post-hearing brief, Claimant specifically seeks to return to school "to learn computers to aid in getting a real job," which arguably implies Claimant does not possess sufficient ability to perform occupations which require knowledge or skill with computers. Thus, the dispatcher job for Mobile County Personnel which requires a course in word processing, is incompatible with Claimant's physical limitations and restrictions as is the manager position with Stuart C. Irby, which requires applicants to possess some computer skills.

The jobs at Friede Goldman are for first-class electricians, which was specifically precluded as an occupation for Claimant, according to his FCE; however, Friede Goldman allegedly provides light-duty employment to first-class electricians who are restricted to light duty. Although the employer is willing to provide light-duty work, there is no description of the light-duty work it will provide that is also consistent with Claimant's specific restrictions. Thus, I find the identified job does not constitute suitable alternative employement.

The manager position at Clark personnel requires knowledge of equipment and good customer service skills. Claimant must be able to assist customers with equipment, fill out paperwork regarding rental policies, and handling money. It is unclear what equipment Claimant must understand, or whether Claimant possesses the requisite customer service skills. However, based on Mr. Tingle's assessment, Claimant possesses few transferrable skills which he acquired in his former occupation. Although Mr. Tingle noted Claimant possesses an ability to communicate orally, can follow written and oral directions, and has a knowledge of electrical concepts and process, there is no indication of record that Claimant acquired the skills required to perform this occupation. Therefore, I find it is not suitable alternative employment.

The last job Mr. Pennington identified in his December 9, 2002 report was a position as a surveillance operator at President Casino. The job description and requirements appear consistent with jobs of the same title for similar employers identified in the

September 27, 2000 labor market survey which was approved by Dr. Smith. Accordingly, I find the position constitutes suitable alternative employment that is within Claimant's physical limitations and restrictions.

In light of the foregoing, I find Employer/Carrier established suitable alternative employment on December 9, 2002 which resulted in an enhanced wage-earning capacity. For the reasons previously provided, I find Claimant failed to establish he diligently pursued employment opportunities. Thus, the suitable jobs identified in Mr. Pennington's December 9, 2002 report include:

Employer:	Description:	Hourly Rate:
Grand Casino	Surveillance Operator	$10.65
Imperial Palace	Surveillance Operator	$10.00
Treasure Bay	Surveillance Operator	$10.00
President Casino	Surveillance Operator	$10.00

Accordingly, I find Employer/Carrier established suitable alternative employment on December 9, 2002 paying $10.16 per hour ([$10.65 + (3 x $10.00)] ÷ 4 = $10.16), or $406.40 for a 40-hour work week ($10.16 x 40 = $406.40). Taking into consideration the increases in the national average weekly wage between August 27, 1999, the date of accident, and December 9, 2002, the date Employer/Carrier proved suitable alternative employment, $406.40 per week in 2002 equates to $355.52 in August 1999.[21] Thus, as Claimant's average weekly wage at the time of accident was $597.22 and his post-injury earning capacity is $355.52, Claimant is entitled to permanent partial disability benefits, pursuant to Section 8(c)(21), of $161.12.[22]

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[21] Claimant was injured on August 27, 1999. The national average weekly wage from October 1, 1998 to September 30, 1999 was $435.88. Employer/Carrier demonstrated suitable alternative employment on December 9, 2002. The national average weekly wage from October 1, 2002 to September 30, 2003 is $498.27, reflecting an increase of $62.39, or 14.31%. ($62.39 ÷ $435.88 = .1431). Employer/Carrier established suitable alternative employment at $406.40 per week on December 9, 2002, and discounting that amount by 14.31% results in 1999 earnings of $355.52 ($406.4 ÷ 1.1431 = $355.52). See Table of Compensation Rates as of October 1, 2001, Longshore Newsletter and Chronicle of Maritime Injury Law, vol. XIX, No. 7, Oct. 2001.

[22] See note 19, supra. Claimant's compensation benefits are computed by subtracting $355.52 from his average weekly wage

D. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

Claimant worked as an electrician for only 2 weeks for Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and

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of $597.22, yielding a difference of $241.70, which, when multiplied by .6666, equals $161.12.

Sons, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990)(34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Further, although Mr. Knowles testified about an alleged calculation by his payroll person based on the average of a sample of ten employees who purportedly worked on the same job as Claimant for an estimated seven months, there is insufficient evidence of any substitute employee's wages of record supporting a conclusion that the calculation Mr. Knowles relied upon fairly or reasonably approximates Claimant's pre-injury average weekly wage. See Palacios v. Campbell Indus., 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), rev'g 8 BRBS 692 (1978) (the record must contain evidence of the substitute employee's wages); Walker v. Washington Metro. Area Transit Auth., 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987) (where there are no employees of the same class, who have worked substantially the whole of the year, resort to Section 10(c) of the Act); Sproull v. Stevedoring Servs. of America, supra, at 104. It is unclear on this record whether the employee data on which the payroll person relied reflected 5-day or 6-day workers, nor is it known how many weeks the substitute workers worked.

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable

approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822. A calculation of average annual earnings over a period of years prior to injury must take into account the earnings of all the years within that period pursuant to Section 10(c) of the Act. See Gatlin, supra; Anderson v. Todd Shipyards,13 BRBS 593, 596 (1981).

I conclude that because Sections 10(a) and 10(b) of the Act can not be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Claimant contends his average weekly wage at the time of injury was at least $1,200.00. Employer argues a fair average weekly wage may be calculated under Section 10(c) of the Act, based on Claimant's average weekly wage during the entire pre-injury period Claimant worked during 1999, including the time he worked for Employer and for another employer, Floore Industrial Contractors, Inc. (Floore). Employer/Carrier assert Claimant earned $19,110.00 during the 32-week period from January 19, 1999 until August 27, 1999, and his average weekly wage is therefore $597.19, which is fair after a consideration of Claimant's work history, wage records, and Social Security Itemized Statement of Earnings since 1992.

The record establishes Employer paid Claimant $16.00 per hour. (EX-8, p. 59). He began work with Employer on August 10, 1999. During the 2.43 weeks he worked for Employer prior to his August 27, 1999 job injury, he earned a total of $2,438.00. (EX-7, pp. 3-5). His average weekly wage during that period was thus $1,003.29 ($2,438.00 ÷ 2.43 = $1,003.29).

When Claimant worked for Floore from January 19, 1999 until June 25, 1999, he earned $16,672.88. Thus, in the 32 weeks during 1999 in which Claimant worked prior to his job injury, his average weekly wage is $597.22 ([$2,438.00 + $16,672.88] ÷ 32 = $597.22).

Meanwhile, Claimant's Social Security Itemized Statement of Earnings indicates he earned $9,364.28, $4,798.50, $26,201.90, $2,401.20, $3,612.73, $4,417.50, and $11,773.64 in 1998, 1997, 1996, 1995, 1994, 1993 and 1992, respectively. There is no indication how many weeks Claimant worked during those periods, whether Claimant enjoyed any pay raises during those times, nor is there any record of time lost in previous periods due to voluntary or involuntary reasons. However, based on a 52-week year, Claimant's average weekly wages for 1998, 1997, 1996, 1995, 1994,

1993, and 1992 are $180.08, $92.28, $503.88, $46.18, $69.48, $84.95, $226.42, which I find are not reasonable or fair approximations of Claimant's earning capacity at the time of his injury.

Accordingly, I agree with Employer/Carrier that the most reasonable and fair approximation of Claimant's average weekly wage under Section 10(c) of the Act may be derived from the earnings Claimant received while working with Employer and Floore prior to his job injury. Thus, a fair and reasonable approximation of Claimant's wage-earning capacity at the time of injury was $597.22.

E. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused

treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

The record establishes Employer/Carrier have paid and continue to pay Claimant's ongoing medical expenses related to his job injury. Further, according to Ms. Henderson, Employer/Carrier anticipate future possibility of medical benefits to be paid for which Carrier maintains a financial reserve on its claims summary. Accordingly, I find Employer/Carrier have paid medical benefits pursuant to Section 7 of the Act.

Insofar as Claimant contends he attempted to seek treatment with Dr. Fleet, Section 7(c)(2) of the Act provides:

> Whenever the employer or carrier acquires knowledge of the employee's injury, through written notice or otherwise . . ., the employer or carrier shall forthwith authorize medical treatment and care from a physician selected by an employee . . . . An employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

33 U.S.C. § 7(c)(2)(2002).

The testimony of Ms. Henderson is persuasive in establishing Claimant requested Drs. Longnecker and Smith as his choice of

physicians. Her testimony is consistent with Claimant's testimony that he requested Dr. Longnecker who referred him to Dr. Smith. Accordingly, I find Claimant's initial free choice of physician was Dr. Longnecker, who referred him to Dr. Smith.

Likewise, Mr. Henderson's testimony that Claimant did not request a change of physicians for treatment with Dr. Fleet is consistent with Claimant's testimony that he never contacted Employer/Carrier to request treatment with Dr. Fleet. Although Claimant testified that he implored his former attorney to seek authorization for medical treatment with other physicians and that he recalled Dr. Longnecker's written referral of Claimant to treat with Dr. Fleet, there is no factual support in the record that any such requests were made by his former attorney or Dr. Longnecker. Therefore, I find that Claimant failed to request a change of physicians.

Assuming **arguendo** Claimant requested a change of physicians, the record does not support a finding that Dr. Fleet is a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury. No qualified physician of record indicates treatment with Dr. Fleet is necessary for a work-related condition. Upon the latent appearance of Claimant's reported symptoms of convulsions and passing out almost two years post-injury, Dr. Longnecker had "no idea what [Claimant] was talking about." Rather, Dr. Longnecker concluded there was "nothing from a neurosurgical or orthopedic point to do," based on his treatment of Claimant, Dr. Smith's treatment of Claimant, and an MRI which Dr. Longnecker opined was "totally normal." Although Dr. Longnecker agreed a neurological evaluation might be appropriate for the reported symptoms of convulsions and passing out, he did not relate the symptoms to Claimant's job injury. Moreover, the record does not support a finding that Claimant established good cause for changing physicians. Therefore, I find, on these facts, Employer/Carrier are not required to consent to Claimant's request for a change of physicians from Dr. Longnecker to Dr. Fleet.

F. The Alleged Section 48(a) Discriminatory Discharge

Section 48(a) of the Act prohibits discrimination by an employer against a claimant based on his involvement in a claim under the Act. If the employee can show he is a victim of such discrimination, he is entitled to reinstatement and back wages. 33 U.S.C. § 948(a). Section 48(a) provides in pertinent part:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner

> discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter . . .

To establish a **prima facie** case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated, in whole or in part, by discriminatory animus or intent. See Holliman v. Newport News Shipbuilding & Dry Dock Co., 852 F.2d 759, 21 BRBS 124 (CRT) (4th Cir. 1988); Hunt v. Newport News Shipbuilding & Dry Dock Co., 28 BRBS 364 (1994), aff'd mem., 61 F.3d 900 (4th Cir. 1995); Brooks v. Newport News Shipbuilding & Dry Dock Co., supra. An administrative law judge may infer animus from circumstances demonstrated by the record. Id. at 3.

The ultimate burden of persuasion lies with the claimant in a Section 48(a) case. Manship v. Norfolk & Western Railway Company, 30 BRBS 175 (1996). Upon satisfaction of the foregoing two elements, a rebuttable presumption that the employer's act was at least partially motivated by the claimant's claim for compensation is created in favor of claimant. Geddes v. Benefit Review Board, 735 F.2d 1412, 1418, 16 BRBS 88 (CRT)(D.C. Cir. 1984). It is employer's burden to establish that its alleged animus was not motivated, even in part, by the claimant's exercise of his rights under the Act. Powell v. Nacirema Operating Co., Inc., 19 BRBS 124 (1986).

The essence of a discrimination claim is that the person who filed the compensation claim (or testified) is treated differently than other similarly-situated individuals. Jaros v. National Steel & Shipbuilding Co., 21 BRBS 26, 29-30 (1988). The Board has explained that the manner in which the claimant is treated in relation to the employer's employment practices is a factor to be considered in a Section 48(a) case. Williams v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 300, 303 (1981). Such discrimination must be committed by the employer after the filing of a claim (or testifying) to properly trigger Section 48(a) protection. Geddes v. Director, OWCP, 851 F.2d 440, 443, 21 BRBS 103 (CRT)(D. C. Cir. 1988).

An employer's business judgment and whether an employer's policies violate any statutes other than the Act are not matters subject to review under Section 48(a). Holliman, 852 F.2d at 761. An administrative law judge does not have the authority to adjudicate whether or not an employee who initiates a claim under Section 48(a) was terminated for justifiable cause according to the

terms of an employment contract or collective bargaining agreement. Winburn v. Jeffboat, Inc., 9 BRBS 363, 367 (1978).

1. Claimant's Prima Facie Case

Claimant's initial burden is to establish Employer committed a discriminatory act motivated by animus or intent. I find and conclude that Claimant has failed to present evidence of discrimination.

Claimant was told he was fired because of excessive late-ins and no-shows on days he failed to call in according to Employer's procedure. Employer asserts Claimant's excessive no-shows and late-ins are the basis of its "legitimate business reason" for discharging Claimant **if** he can establish a **prima facie** case of discrimination. I find that he did not.

Employer contends Claimant failed to follow procedures regarding timely calling in upon an anticipated tardiness or absence from work even before his job injury, and his continued violation of company policy resulted in his termination. Claimant was late twice and was reported as a no-call/no-show between August 10, 1999, when he began working for Employer, and on August 27, 1999, the date of injury. During that time, he received a verbal reminder against the offense of no-shows/no-calls on August 20, 1999.

Post-injury, Claimant received graduated disciplinary action for excessive late-ins and no-call/no-shows. He received a written warning on September 10, 1999, a temporary suspension on September 12, 1999, and release from employment on October 18, 1999. On those dates, Claimant acknowledged his signature on the documents describing the disciplinary action taken, and agreed he failed to call-in or missed work on the dates in question.

Mr. Knowles testified Claimant violated Employer's policy against excessive late-ins and no-shows, and there is no evidence indicating Claimant was treated any differently than any other employee for his violation of the policy.

While the facts establish Claimant's late-ins and no-call/no-shows are not unrelated to Claimant's disability for the purposes of establishing Claimant's loss of wage-earning capacity, as discussed above, none of the foregoing is germane to Claimant's burden to establish a **prima facie** case of discrimination under Section 48(a) of the Act. The record is devoid of any evidence that Claimant's filing a compensation claim motivated Employer's

action against him. Temporal proximity between the filing of a compensation claim and an alleged discriminatory discharge can be indicative of discriminatory intent. Here, clearly, there is a lack of any close temporal proximity since Claimant was terminated nearly one month before he filed his claim. The record contains no evidence of animus, whether direct or circumstantial, exhibited by Employer toward Claimant for having filed a compensation claim.

Thus, the record contains no evidence that Claimant was treated differently from similar employees. Claimant has not fulfilled his burden of establishing a discriminatory act motivated by animus as he has presented no evidence that he was treated differently from other employees violating company policy regarding excessive late-ins and no-call/no-shows. In contrast, the record does contain evidence that Employer terminated Claimant's employment because he purportedly violated an employment policy; thus, the only record evidence supports a finding of no discrimination. See Ledet v. Phillips Petroleum Co., 163 F.3d 901, 32 BRBS 212 (CRT)(5th Cir. 1998).

Moreover, insofar as Claimant alleges Employer terminated him because he hired an attorney, I find his claim is without merit. Assuming **arguendo** that Claimant's hiring of former counsel on October 18, 1999, nearly one month before filing a claim, would constitute the basis for a Section 48(a) discrimination claim, which I find is not supported by the record, there is no factual support for a finding Employer knew or became aware of Claimant's decision to hire an attorney before it terminated him on October 18, 1999.

As Claimant has not met his burden of proof, I conclude that the burden of proof/persuasion does not shift to Employer to demonstrate a legitimate business reasons for its action. I further conclude Employer has not violated Section 48(a) of the Act. Where a business judgment has been exercised by Employer, in the absence of a showing of discrimination and animus, an administrative law judge cannot substitute his judgment in reviewing the merits of Employer's action. Therefor, Claimant's claim of discriminatory discharge is denied.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties

attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer/Carrier paid temporary compensation benefits for Claimant's temporary total disability from November 11, 1999 until October 4, 2000, based on Claimant's estimated average weekly wage of $631.05. (EX-14). Employer/Carrier ceased paying disability benefits on October 31, 2000, and have paid no compensation to Claimant since. Claimant's pre-injury average weekly wage of $597.22 yields a compensation rate of $398.11.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[23] Thus, Employer was liable for Claimant's disability compensation payment on September 10, 1999. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by September 24, 1999 to be timely and prevent the application of penalties. Consequently, since Employer/Carrier did not file a notice of controversion until December 17, 1999, I find and conclude that Employer/Carrier are liable for Section 14(e) penalties from September 24, 1999 until November 11, 1999, based on his average weekly wage of $597.22.

Further, where the employer unilaterally suspends its voluntary payment of benefits, a controversy arises between the parties on the date of the employer's unilateral suspension. Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 347 (1988); Garner v. Olin Corp., 11 BRBS 502, 506 (1979). See also Olson v. Healy Tibbits Constr. Co., 22 BRBS 221, 224-25 (1989) (a claimant's Section 14(e) request was denied where the record failed to indicate the date upon which an employer ceased making voluntary payments of compensation); Tezeno v. Consolidated Aluminum Corp., 13 BRBS 778, 783 (1981); Daniele v. Bromfield Corp., 11 BRBS 801, 806-07 (1980). No controversion was filed by Employer/Carrier after they suspended payments on October 31, 2000. Accordingly, the period of assessment commences 14 days after the controversy arose. Harrison, supra at 347. Liability for the Section 14(e) penalty ceases when DOL "knew of the facts a proper notice would have revealed." Nat'l Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1295 (9th Cir. 19789); Hearndon v. Ingalls Shipbuilding,

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[23] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

Inc., 26 BRBS 17, 20 (1992) (DOL knew of facts that a proper notice would have revealed when the matter was referred to OALJ for a formal hearing).

In the present matter, there is no record of the date of informal conference; however, the matter was referred to OALJ on November 7, 2002. Accordingly, I find and conclude Employer/Carrier's liability for additional Section 14(e) penalties based on unpaid benefits began on November 14, 2000, which is 14 days after October 31, 2000, the date of final payment, and terminated on November 7, 2002, the date this matter was referred to OALJ.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

Claimant was ultimately successful on the prosecution of his claim. His counsel may file a fee petition for services rendered upon a showing that any work performed contributed to the success of the case. An attorney fee lien was noted in a May 7, 2002 Order Approving Withdrawal of Counsel issued by the undersigned.

It should further be noted that the withdrawal of Claimant's Counsel was approved before this matter was referred to this

office. Each body, the District Director, judge, Board or court, before whom services were rendered, should make the determination of the worth of the representation. 28 U.S.C. § 928 (2000); 20 C.F.R. § 702.132 (2001); Vincent v. Consolidated Operating Co., 17 F.3d 782, 787 n. 17-18 (5th Cir. 1994)(citing Ayers S.S. Co. v. Bryant, 544 F.2d 812, 814 (5th Cir. 1977)). At the ALJ level, the judge can generally only award the hours spent between the close of the informal conference before the District Director, and the issuance of the judge's Decision and Order. Stratton v. Weedon Engineering Co., BRB No. 00-583, 2001 WL 233839, *8 (DOL Ben.Rev.Bd.)(an administrative law judge "inappropriately awarded a fee for services performed while this case was before the District Director"). Therefore, the undersigned only has authority to award attorney fees after that date. Claimant's Counsel should petition the District Director for any work done prior to November 7, 2002, when the matter was referred to this office.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from August 27, 1999 to September 26, 2000, based on Claimant's average weekly wage of $597.22, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for temporary partial disability from September 27, 2000 to December 3, 2000 based two-thirds of the difference between Claimant's average weekly wage of $597.22 and his reduced weekly earning capacity of $295.62 in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from December 4, 2000 until December 8, 2002 based on two-thirds of the difference between Claimant's average weekly wage of $597.22 and his reduced weekly earning capacity of $295.62 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay Claimant compensation for permanent partial disability from December 9, 2002 and continuing based on two-thirds of the difference between Claimant's average weekly wage of $597.22 and his reduced

weekly earning capacity of $355.52 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 27, 1999 work injury, pursuant to the provisions of Section 7 of the Act.

6. Employer shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing from September 24, 1999 until November 11, 1999, as provided herein.

7. Employer shall be liable for an assessment under Section 14(e) of the Act for unpaid compensation benefits from November 14, 2000 until November 7, 2002, as provided herein.

8. Employer shall receive credit for all compensation heretofore paid, as and when paid.

9. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

10. Claimant's former counsel shall have thirty (30) days from the date of service of this Decision and Order to file a fully supported fee application with the District Director for any work done prior to November 7, 2002; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto

ORDERED this 30th day of April, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge